93-782

No.

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

THOMAS NSENGA KANZA,

Petitioner,

vs.

EMPIRE SERVICES, INC.,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

HELEN S. ROGERS
Counsel of Record
DOUGLAS E. JONES
JONES & ROGERS
Attorneys for Petitioner
Suite 1550
Third National Bank Building
201 Fourth Avenue, North
Nashville, Tennessee 37219
(615) 256-3774

4430
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTIONS PRESENTED

1. Whether the due process rights of the Petitioner, a foreign national, were violated when a default judgment was entered against him by the district court and affirmed by the court of appeals, when the only evidence offered of service was opposing counsel's affidavit rather than proof pursuant to Tennessee's long-arm statute requirement of a mailing with a signed return-receipt.

2. Whether the Respondent had standing to litigate an alleged claim based on an alleged third party assignment, without proof of the assignment to the second party.

3. Whether the court of appeals correctly affirmed the district court judgment that the petitioner's transaction with the respondent constituted a transaction satisfying the RICO requirement of a "pattern" of racketeering activity.

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

The caption contains the names of all the parties below. The Respondent, Empire Services, Inc., is a corporation organized under the laws of the State of Tennessee and has no parent companies or subsidiaries.

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STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on July 1, 1993. The court of appeals' order denying a rehearing *en banc* was entered on August 18, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS INVOLVED

The appendix to this petition includes the following statutes, rules and constitutional provisions:

U.S. Const. amend. V

18 U.S.C. § 1341, *et seq.*

18 U.S.C. § 1961

18 U.S.C. § 1962

18 U.S.C. § 1963

18 U.S.C. § 1964(c)

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STATEMENT OF THE CASE

Petitioner Thomas N. Kanza is a citizen and resident of the country of Zaire, Africa. Respondent is a Tennessee corporation with its principal offices located in Nashville, Davidson County, Tennessee.

In the complaint filed on April 27, 1990, in the United States District Court, Middle District of Tennessee by Empire Services, Inc. against Mr. Kanza, the Respondent alleged that there existed an agreement between the parties concerning the financing of certain contracts for the export of coffee from Zaire. The complaint alleged that Mr. Kanza breached this agreement and also violated 18 U.S.C. §§ 1964(c) and 1965(a), commonly known as "RICO" (Racketeer Influenced and Corrupt Organizations Act).

Additionally, the Complaint alleged that Kanza's conduct constituted fraudulent breach of trust and breach of fiduciary duty and that Kanza breached "his contract" with James L. Winfree. James L. Winfree is not a party to this case.

The complaint and summons were mailed on May 3, 1990, pursuant to Tenn. Code Ann. § 20-2-206 by the Tennessee Secretary of State to the Petitioner in Oxford, England, by certified mail, return-receipt requested. However, the return-receipt was never received.

A tracer request was filed by the Secretary of State with the United States Post Office to determine the status of the complaint and summons mailed. The Secretary of State notified the United States District Court clerk on October 3, 1990, that no record of postal delivery could be found.

On December 4, 1990, the court ruled that service had been achieved based upon the required mailing of the Secretary of the State of Tennessee and the affidavit of Thomas E. Watts, Jr., counsel for the Respondent.

The Respondent filed a motion for entry of a default judgment which the court granted and entered on April 29, 1991.

On October 15, 1991, Petitioner through his attorney, filed a motion to vacate and set aside the default judgment before a final judgment had been entered.

On December 3, 1991, an order was entered by the trial court setting oral argument for the motion to vacate the default judgment. The trial court heard oral argument regarding the motion, and entered an order denying the Petitioner's motion on March 6, 1992 and granting the Respondent a judgment of One Hundred Eighty-Seven Thousand Five Hundred ($187,500.00)

Dollars and Ten Thousand One Hundred Fifty-Seven and 12/100 ($10,157.12) Dollars in attorney fees.

On April 3, 1992, the Petitioner filed a notice of appeal with the United States of Appeals for the Sixth Circuit, and on July 1, 1993, the judgment of the district court was affirmed.

On July 14, 1993, the Petitioner applied for a rehearing *en banc*, which request was denied on August 18, 1993.

BASIS OF FEDERAL JURISDICTION

Jurisdiction was alleged to be vested in the United States District Court for the Middle District of Tennessee under the provisions of 28 U.S.C. § 1332(a)(2), as the matter in controversy is between a citizen of a state (Empire Services, Inc.) and a citizen of a foreign country (Thomas N. Kanza), and the amount in controversy exceeds Fifty Thousand ($50,000.00) Dollars, exclusive of interest and costs.

Jurisdiction was also alleged under the provisions of 18 U.S.C. §§ 1964(c) and 1965(a) [the Racketeer Influenced and Corrupt Organizations Act or "RICO"], Respondent alleging that the Petitioner violated the provisions of 18 U.S.C. §§ 1962(a), (b) and (c), and the Petitioner having transacted his affairs within the jurisdiction of the United States District Court for the Middle District of Tennessee.

REASONS FOR GRANTING THE WRIT

I.

DETERMINATION THAT SERVICE OF PROCESS WAS EFFECTED IS NOT SUPPORTED BY THE EVIDENCE.

Due process requires proper service of process on a defendant in order for a court to obtain jurisdiction of his person. U.S. Const. amend. V.

Tennessee statutes providing for substituted service of process are in derogation of common-law rights and, in observance, must be strictly construed. *Jones v. Volkswagen,* 82 F.R.D. 334 (E.D. Tenn. 1978); *Shires v. Magnavox Co.,* 74 F.R.D. 373 (E.D. Tenn. 1977).

The requirements of service through the Secretary of State of Tennessee are enumerated in Tenn. Code Ann. § 20-2-206 as follows:

> **Evidence of service through secretary of state.**
>
> The original process, endorsed as below, an affidavit of the secretary of state setting forth his compliance with the requirements of § 20-2-205, *and the return-receipt signed by, or duly in behalf of, the defendant,* shall be attached together and sent to and filed by the clerk. There shall be endorsed on the original process by the secretary of state over his signature the date of his mailing the certified copy to the defendant and the date on which he received

> the return-receipt of the defendant; *thereupon service on the defendant shall be consummate.*

(Emphasis supplied).

In a diversity action, the federal district court did not acquire personal jurisdiction over a defendant where the defendant was not properly served by registered mail by the Secretary of State, as the return-receipt was unsigned and the letter returned by postal authorities. *Yox v. Durgan,* 298 F. Supp. 1365 (E.D. Tenn. 1969), *sustained,* 302 F. Supp. 1262 (1969).

In *Jones, supra,* the court denied a motion to reconsider an order of the United States Magistrate Judge granting the defendant's motion to quash service of process. The court ruled that service of process under Tennessee's long-arm statutes had not been perfected as the plaintiff was required to provide evidence of such service, including a return receipt signed by, or duly in behalf of, the defendant before service on the defendant shall be consummate. *See also, Solida v. Ledford,* 75 F.R.D. 529 (W.D. Tenn. 1977).

Even though the court has the discretion under Rule 4(g) of the Federal Rules of Civil Procedure to declare service valid even without proof of service, the 1963 Advisory Committee Notes to Rule 4(E)(i)(2) state that "[t]he special provision for proof of service by mail is intended as an additional safeguard when that method is used," indicating the special importance of proof of service when service is made under Rule 4(i)(1)(D). *Gordon v. Hunt,* 116 F.R.D. 313, 317 (S.D. N.Y. 1987), *aff'd,* 835 F.2d 452 (2nd Cir. 1987), *cert. denied,* 486 U.S. 1008, 108 S. Ct. 1734, 100 L. Ed. 2d 198 (1988). If there is no evidence of delivery, service should not be deemed to have been effected. *Id.* at 318.

The only proof of service offered to the court by the

Respondent was: (1) Thomas E. Watts, Jr.'s statement that J. Lloyd Grant had told him that the Petitioner had received the complaint and summons; and (2) an unsigned return-receipt which does not indicate that the Petitioner even received the subject documents. (R.6, Ex. A and B). The requirements of Tenn. Code Ann. § 20-2-206 and § 20-2-216, were not fulfilled as no return-receipt was received with the Petitioner's nor anyone else's signature indicating that the documents had been received or refused.

Furthermore, the Magistrate exceeded the spirit of Rule 4(g) of the Federal Rules of Civil Procedure by failing to give proper weight to the absence of a signed return-receipt when foreign service of process is attempted by mail. There is no independent, verifiable evidence to indicate the Petitioner had knowledge of or was in receipt of the complaint and summons. The United States Magistrate Judge's granting of the Respondent's motion to determine that service of process was effective should be overturned. (R.9). If that determination was incorrect then this entire matter should be remanded, and the Petitioner allowed to file an answer. The remaining issues of this brief would then be moot.

II.

RESPONDENT LACKS STANDING AND IS NOT A REAL PARTY IN INTEREST.

It is Petitioner's position that the Respondent is not a real party in interest in this matter. Accordingly, it does not have standing to bring this cause of action.

Federal Rules of Civil Procedure, Rule 17(a) "Real Party in Interest" requires every action shall be prosecuted in the name of the real party in interest. Applying Rule 17 to the instant case, it is clear that the Respondent is not the real party in interest.

In the case of *Rosenfeld v. Continental Building Operating Co.*, 135 F. Supp. 465 (W.D. Mo. 1955), the court in interpreting Rule 17(a) stated:

> Rule 17(a) requires simply that "Every action shall be prosecuted in the name of the real party in interest". That means that the one who seeks relief upon a claim must, legally, or equitably, *own the claim under the substitutive law of the state. Id.* at 467.

(Emphasis supplied).

See also, United States Fidelity & Guaranty Co. v. Slifkin, 200 F. Supp. 563, 571 (N.D. Ala. 1961).

A review of the complaint reflects that the Respondent does not have standing to bring this action. Respondent, as stated in the complaint, is a mere transferee of "all rights which he (Mr. Winfree) personally had against Kanza". (R.1: Complaint at p. 9, ¶ 20). Paragraph 21 of the complaint then describes the Respondent as a "successor in interest." (R.1: Complaint at p. 9, ¶ 21).

Tennessee substitutive case law sets forth the requirements of a valid assignment. In the case of *Hutsell v. Citizens National Bank, et al.*, 64 S.W. 2d 188 (Tenn. 1933), the Supreme Court of Tennessee held that:

> An assignment is a contract, and is subject to the same requisites as to validity as other contracts, such as proper parties, mutual assent, consideration, and legal subject matter. *Id.* at 190.

In the complaint, neither Mr. Winfree nor the Respondent have alleged that Mr. Winfree is the assignee of the "unidentified lenders," but rather has simply "assigned" his claim, whatever it may ultimately prove to be, to the Respondent. (R.1: Complaint at p. 9, ¶ 20). The absence of the two lenders subject the Petitioner to an identical suit in the future by these same unidentified lenders. The complaint does not on its own supply sufficient information for the court to determine what claim, if any, Empire Services or Mr. Winfree have against the Petitioner.

Indeed, this is the very basis for Rule 17(a) of the Federal Rules of Civil Procedure, which is to prevent a defendant from being forced to defend subsequent suits in the same cause of action. *United Federation of Postal Clerks, AFL-CIO v. Watson*, 409 F.2d 462 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 902, 90 S. Ct. 212, 24 L. Ed. 2d 178 (1969); *Gulf Oil Corp. v. Mobil Drilling Barge*, 441 F. Supp. 1 (E.D. La. 1975), *aff'd*, 565 F.2d 958 (5th Cir. 1978).

Furthermore, it is a well-settled principal of law that:

> A defendant is ordinarily entitled to have the real party in interest maintain the action in order to fix and maintain the real liability, if any, which is alleged in the complaint.

67A C.J.S. *Parties* § 17 p. 671.

Paragraph 20 of the complaint states that the Respondent was assigned the claim on behalf of Mr. Winfree for reasons that are anything but clear. The purported basis of the assignment of the cause of action was to assist Mr. Winfree in being "more certain that funds belonging to the unpaid lender would be kept separate from Winfree's funds." (R.1: Complaint at p. 9, ¶ 20). Absent is any allegation that would identify the Respondent as a real party in interest. In fact, close reading of the complaint raises serious

concerns in terms of Mr. Winfree's ability to prosecute a claim on behalf of various unnamed and unidentified lenders, separate and apart from any speculative claim he may have had for lost profits although he had absolutely no cash investment of his own in this transaction.

In short, the gravamen of this complaint herein is a loan of monies by two unnamed and unidentified lenders in anticipation of a huge windfall and entirely unrealistic profit. There is no allegation of any notes existing which evidences these loans. The complaint, taken as true, demonstrates that Mr. Winfree was not at any time the actual lender of these monies. Thus, to the extent that Mr. Winfree has "assigned" his interest in this litigation, it would appear that his interest is tenuous at best. The Respondent would appear to have no connection or interest in this litigation.

The operative allegations can be distilled down to the following:

a) Winfree brokered a loan from two unidentified lenders to Kanza totalling Fifty Thousand ($50,000.00) Dollars (R.1: Complaint at p. 4, ¶ 9 and p. 5, ¶ 11).

b) This loan was to be the capital used to facilitate and/or to assist the Petitioner in his capacity as a broker for coffee sales from Zaire to Europe (R.1: Complaint at pp. 2-4, ¶ 5-6).

What is not alleged, but appears in the pleadings, is that Mr. Winfree initiated this effort to broker coffee sales based upon his knowledge that Mr. Kanza's professional background might help Mr. Winfree accomplish this "deal." *Mr. Winfree had no capital investment in this transaction.* There was no written contract with the Petitioner.

Mr. Winfree persuaded two "friends and acquaintances" (R.1:

Complaint at p. 4, ¶ 9) to loan Twenty-Five Thousand ($25,000.00) Dollars each to fund this transaction. For his efforts, Mr. Winfree alleged that he expected to receive a Forty-Five Thousand ($45,000.00) Dollar profit on the coffee contract (R.1: Complaint at p. 8, ¶ 18), notwithstanding the fact that he did not have any of his own funds committed to facilitate this transaction, nor did he have the ability to consummate this deal without Mr. Kanza.

In short, Mr. Winfree was using other people's money to "seed or fund this speculative venture," using the Petitioner's contacts and knowledge, and hoped to reap a Forty-Five Thousand ($45,000.00) Dollar profit without any risk to himself. Thus, assuming, without conceding the Respondent's standing to assert this claim, his prayer for relief as to damages contrasted with damages by other lenders is completely speculative, unreasonable and is not supported by any consideration or documentation.

The two loans by the unidentified lenders were made *prior* to any representation being made by the Petitioner to these lenders. In February 1989, Mr. Winfree, as agent for the two "American lenders . . . sent two wire transfers of Twenty-Five Thousand ($25,000.00) Dollars each." (R.1: Complaint at p. 5, ¶ 11). "After the funds had been transferred . . . the Defendant came to Nashville, Tennessee, and on February 17, 1989, met with Winfree, the lenders, and other prospective lenders . . . ." (R.1: Complaint at p. 5, ¶ 12).

There is no suggestion that the Petitioner made any representations whatsoever to the unidentified lenders upon which they relied in granting these loans. Whatever representations were made to them had been made by Mr. Winfree. Respondent's complaint fails to state a claim upon which relief can or should have been granted for fraudulent breach of trust and breach of fiduciary duty. Accordingly, the Respondent, Empire Services, is not the real party in interest and has no standing to bring this action.

It is respectfully urged that the Court consider the obvious lack of standing in terms of assessing the impropriety and the irregularity of the default entered herein. Taking the allegations of the complaint as true, the Respondent is without legal standing to assert any claims against the Petitioner. Furthermore, under Tennessee law, there was no "assignment" in this matter.

III.

RESPONDENT'S COMPLAINT FAILS TO STATE CAUSE OF ACTION AS TO RICO CLAIM.

The Respondent filed suit alleging a violation of 18 U.S.C. §§ 1964(c) and 1965(a), commonly known as "RICO". (R.1: Complaint at pp. 1-2, ¶ 3). RICO is the result of the "Organized Crime Control Act of 1970" and was enacted to protect legitimate enterprises from the influence of organized crime, and it makes it unlawful for any individual or legal entity, who has derived an income from a pattern of racketeering activity to use such income, directly or indirectly, to acquire an interest in the affairs of any business enterprise which engages in or affects interstate or foreign commerce. RICO is primarily a criminal statute aimed specifically at curtailing the infiltration of business enterprises by organized crime. By enacting RICO, Congress sought to eradicate organized crime by strengthening the legal tools, and the evidence gathering process, and by establishing penal prohibitions. *See United States v. Turkette*, 452 U.S. 576, 101 S. Ct. 2524, 69 L. Ed. 2d 246 (1981).

The courts have recognized that the potency of RICO and its treble damages provision serves to emphasize Congress' determination to provide a comprehensive arsenal of weapons against the proliferation of organized crime. *Mauriber v. Shearsons–American Express, Inc.*, 546 F. Supp. 391 (S.D.N.Y. 1982). Clearly, the major goal of Congress was to punish the financial infiltration and corrupt operation of legitimate business

enterprises by organized crime. *United States v. Roan,* 598 F.2d 564 (9th Cir. 1979), *cert. denied sub nom, Little v. United States,* 445 U.S. 946, 100 S. Ct. 1345, 63 L. Ed. 2d 780 (1980).

Indeed, at least one court has noted the mounting "controversy" in the federal courts over the proper limits, if any, on the use of RICO in cases far removed from the context of organized crime, which Congress had in mind when it enacted the statute. *Hanna Mining Co. v. Norcen Energy Resources, Ltd.,* 574 F. Supp. 1172 (N.D. Ohio 1982).

A. Basic Requirements Necessary to Establish RICO Claim.

The courts have agreed, almost without exception, that a plaintiff must, at a minimum, properly allege in the complaint and then prove at trial a pattern of racketeering activity. Since the onus of a RICO allegation is of a criminal character, any such allegation should not be lightly tolerated without very specific pleading of particular facts showing that a probable cause that the violation took place.

A claim under 18 U.S.C. § 1964(c) was dismissed by the court in *Teleprompter of Erie, Inc. v. Erie,* 537 F. Supp. 6 (W.D. Pa. 1981) for the failure to allege sufficient facts to demonstrate that the defendant had engaged in a pattern of racketeering activity within the meaning of RICO. The court made clear that it was incumbent upon the plaintiff to prove under RICO that the defendants had an association with an "enterprise" and that there existed a "pattern of racketeering activity." In the case at bar, the Respondent also failed to demonstrate a "pattern of racketeering activity" under 18 U.S.C. § 1961(5) since *it requires at least two separate identifiable acts.* The case at bar involves only one isolated transaction.

Similarly, in *Eaby v. Richmond,* 561 F. Supp. 131 (E.D. Pa. 1983), the court dismissed the RICO claim because the complaint

failed to allege a pattern of racketeering activity. A single, isolated transaction does not satisfy the RICO requirement of a "pattern" of racketeering activity. *Secon Service System, Inc. v. St. Joseph Bank & Trust Co.*, 855 F.2d 406 (7th Cir. 1988).

B. Review of the Instant Case Shows Allegations Insufficient to Meet RICO Requirements.

A review of the complaint demonstrates the absence of any allegation of an ongoing criminal enterprise on the part of the Petitioner or that there existed a pattern of racketeering activity. The Respondent simply alleged monies were loaned by two unidentified lenders in February 1989, before any contact or communication between the two lenders and the Petitioner. (R.1: Complaint at p. 5, ¶ 11).

Only after the loan was made was there any contact between the lenders and the Petitioner. See paragraph 12 of the complaint, which alleges a meeting between these "parties" on February 17, 1989. (R.1: Complaint at pp. 5-6, ¶ 12). To this point in time, any representations made as an inducement to the lenders had to have been made by Mr. Winfree to the lenders and not by the Petitioner. Moreover, the money had already been transferred, and thus there can be no claim for fraud since there were no representations made by the Petitioner to the lenders upon which they would have or could have relied.

Additionally, Respondent's complaint exhibits show that any communications were to Mr. Winfree and not to the lenders. (R.1: Ex. A and B: Complaint). Both of these exhibits predate the loan and the meeting of February 17, 1989. Any dissemination of these communications to the lenders had to have been by Mr. Winfree, and not by the Petitioner. The sole meeting and communication between the lenders and Mr. Kanza occurred *after* the loan had been consummated. One meeting does not constitute a "pattern" as that phrase has been construed by the courts as they

grapple with RICO. By its very terms, RICO, at 18 U.S.C. § 1961(5), requires proof of (or at this stage simply the allegation of) two acts of racketeering activity.

It is important to note that the RICO statute grants a cause of action for injury "by reason of" a violation of 18 U.S.C. § 1963, and most courts have interpreted this to require a showing that the injury was caused by "racketeering activity," rather than an injury caused directly by the underlying activities of 18 U.S.C. § 1961 that constitute the racketeering activity. Courts have expressed the view that the injury must be a direct consequence of the RICO violation itself, and not collaterally caused. *Landmark Savings & Loan v. Rhoades,* 527 F. Supp. 206 (E.D. Mich. 1981).

In the *Landmark, supra,* decision, the court denied the RICO claim since the plaintiff's fraud claims were compensable under a fraud cause of action, if the plaintiff suffered an injury by reason of fraud in which the mail happened to be used. This is analogous to the Respondent's allegations herein, wherein the predicate offenses appear to be premised upon 18 U.S.C. § 1341, *et seq.,* known as mail or wire fraud.

A close scrutiny of the documents transmitted by wire (R.1: Ex. A and B: Complaint) do not, in fact, guarantee the shipment of the coffee. Exhibit "A" (R.1: Ex. A: Complaint) only references the signing of a contract. Similarly, it does not appear to guarantee any profit.

Furthermore, the Respondent confirmed in paragraph 20 of the complaint (R.1: Complaint at p. 9, ¶ 20) that the contract for the shipment of the coffee existed, and thus the telexed communication from the Petitioner regarding the existence of the contract is hardly false or fraudulent. The fact that there existed a contract, as represented by the Petitioner, and given the fact that the coffee never actually left Zaire could be the natural result of

any number of reasons. Any of these different possibilities could serve as the factual defense to a breach of contract which appears to be the proper cause of action, if any. Certainly the absence of a false representation coupled with the absence of any possible reliance by the parties in interest precludes recovery by the Respondent under RICO.

C. Respondent's Complaint Fails to Articulate Any RICO Damages.

Even if there is a claim in this matter, the Respondent's recovery should be limited to the alleged lost profits. (R.1: Complaint at pp. 9-10, ¶ 21). Just as there was no separate proof of a RICO damage in the *Landmark* decision, so too is the underlying complaint devoid of any separate and articulable RICO damage. Of further note is *Haroco Inc. v. American National Bank & Trust Co.*, 747 F.2d 384 (7th Cir. 1984), *aff'd*, 473 U.S. 606, 105 S. Ct. 3291, 87 L. Ed. 2d 437 (1985), in which the Court adopted the position that a plaintiff's injury, in order to be recognizable under 18 U.S.C. § 1964(c) must be caused by criminal conduct in violation of 18 U.S.C. § 1962 and not simply the commission of a predicate offense. In *Noland v. Gurley*, 566 F. Supp. 210 (D. Colo. 1983) the court stated that RICO is not broad enough to embrace every fraudulent act and 18 U.S.C. § 1964(c) must be interpreted with careful attention to the statutory purpose of preventing federalizing through RICO, what traditionally had been civil actions in state courts. That fraud alone and injury from it, does not give rise to civil liability under 18 U.S.C. § 1964(c). *County of Cook v. Midcon Corp.*, 574 F. Supp. 902 (N.D. Ill. 1983), *aff'd*, 773 F.2d 892 (7th Cir. 1985); *North Barrington Development, Inc. v. Fanslow*, 547 F. Supp. 207 (N.D. Ill. 1980); *Friedlander v. Nims*, 571 F. Supp. 1188 (N.D. Ga. 1983), *appeal dismissed*, 747 F.2d 1467 (11th Cir. 1984), *aff'd*, 755 F.2d 810 (1985). It is incumbent upon a plaintiff to properly allege, and thereafter prove, a nexus, as delineated in 18 U.S.C. § 1962, between the pattern of racketeering activity and the affairs of an enterprise. Obviously, this requires

enterprise. Obviously, this requires the complaint allege, at a minimum, the existence of an enterprise as defined in 18 U.S.C. §§ 1961 and 1962.

Courts have denied RICO claims depending upon the sufficiency with which the plaintiffs have satisfied this requirement. In a RICO action alleging misrepresentation in the sale of automobile insurance, the "enterprise" element was not sufficiently alleged where there were no factual allegations from which it could be inferred that the defendants belonged to any such association. *Plount v. American Home Assurance Co., Inc.*, 668 F. Supp. 204 (S.D. N.Y. 1987).

Additionally, in *Montesano v. Seafirst Commercial Corp.*, 818 F.2d 423 (5th Cir. 1987) the court held that the RICO allegation failed where the association alleged by the plaintiffs lacked continuity, did not function as a continuing unit, nor did it continue functioning as a unit apart from its conspiracy to repossess the plaintiffs' ship. So too has the Respondent failed herein to properly allege any ongoing "enterprise" separate and apart from the action of Mr. Kanza individually. Even if the Petitioner did make certain representations to Mr. Winfree regarding Mr. Kanza's business contacts and ownership, he is not the plaintiff in this case and Mr. Winfree has lost nothing in this transaction. However, the salient fact in this matter is that the complaint does not allege any representations made by Mr. Kanza to the actual lenders of this money. To the contrary, paragraph 8 of the complaint makes clear that Mr. Winfree made various representations to the lenders, but not Mr. Kanza. (R.1: Complaint at p. 4, ¶ 8).

The courts have further required plaintiffs to allege that the "enterprise" was engaged in or affected interstate or foreign commerce. [18 U.S.C. § 1962(b)]. The failure to so allege or to prove this element would result in denial of the claim under RICO. *See Brekke v. Volcker*, 652 F. Supp. 651 (D. Mont. 1987); *Delta*

Truck and Tractor, Inc. v. J. I. Case Co., 855 F.2d 241 (5th Cir. 1988), *cert. denied*, 489 U.S. 1079, 109 S. Ct. 1531, 103 L. Ed. 2d 836 (1989).

The United States Court of Appeals for the Fifth Circuit in the *Delta Truck* case reiterated that pleading the existence of a "pattern of racketeering activity" is necessary in that proving two isolated acts may have been held sufficient to constitute a pattern, but that at the same time, two such acts alone may fail to satisfy the requirement of there being a continuous threat. The Court stated "the critical features of a pattern of racketeering activity are continuity and relationship." *Id.* at 243. Thus, if the Complaint simply alleges numerous acts that are part of a single, otherwise lawful activity, it is insufficient to satisfy RICO. In fact, the Supreme Court has stressed the continuous and necessary attribute of an association in fact enterprise. *United States v. Turkette*, 452 U.S. 576, 583, 101 S. Ct. 2524, 2528-29, 69 L. Ed. 2d 246 (1981).

D. Respondent's Complaint Fails to Allege RICO Enterprise Requirements.

An "association in fact enterprise" must: (1) have an existence separate and apart from the pattern of racketeering; (2) be an ongoing organization; and (3) its members must function as a continuing unit as shown by an hierarchical or consensual decision making structure. *Delta Truck, supra.* The *Delta Truck* trial court properly dismissed the second amended complaint which was in turn confirmed by the Court of Appeals. The plaintiff had attempted to state a RICO claim by alleging multiple acts of fraud that were part and parcel of a single and otherwise lawful commercial transaction.

Just as the complaint in *Delta Truck* failed, the cause of action set out by the Respondent herein is deficient. There is no allegation of any effect on interstate commerce, nor is there any suggestion of

a continuous threat posed by the Petitioner, nor is there any suggestion or allegation of any association in fact which is ongoing and functioning as a continuing unit. The only possible effect of the Petitioner's activities is on the foreign commerce between a nation of Africa and a nation in Europe. Congress in passing RICO could not have been concerned with this type of commerce.

Additionally, the Respondent has failed to allege that the person (Mr. Kanza) must be distinct from and participate in the affairs of this improper "enterprise." For a case to be properly alleged under RICO, the enterprise and the person cannot be the same entity. The element which raises the underlying criminal act to a RICO violation for purposes of civil recovery is the defendant's interaction with the enterprise. *See Bays v. Hunter Savings Assoc.*, 539 F. Supp. 1020 (S.D. Ohio 1982); *Kaufman v. Chase Manhattan Bank,N.A.*, 581 F. Supp. 350 (S.D. N.Y. 1984); and *Bennett v. Burg*, 710 F.2d 1361 (8th Cir. 1983).

These basic pleading requirements have not been met by the Respondent. The allegation of an ongoing enterprise is insufficient to meet the definitions of 18 U.S.C. § 1961. There is no allegation of any criminal infiltration into a legitimate business by organized crime. In short, the Respondent has alleged that the Petitioner represented the existence of certain contracts for the sale of approximately 1800 tons of coffee (R.1: Complaint at pp. 3-4, ¶ 6). The Respondent further alleged that the existence of these contracts was independently confirmed through Mr. Kumar (R.1: Complaint at p. 9, ¶ 20), but that the coffee was unable to be delivered. There are any number of possible reasons as to why the coffee was not delivered, all of which are appropriate for a trial on the merits. However, the fact that a contract was reported to exist, and, confirmed by Mr. Kumar, should remove this matter from the penumbra of any RICO claim.

E. Facts of Case Merit Setting Aside Default Judgment.

The Petitioner filed a motion to set aside the default judgment entered in this matter pursuant to Federal Rules of Civil Procedure, Rules 55 and 60.

Rule 60 requires that the motion be filed within a reasonable time and not more than one year after the judgment. As set out above, the docket entries reflect that the default was entered on April 29, 1991 (R.15: Entry of Default), and thus, the relief which the Petitioner originally requested was both reasonable and timely.

It should be noted that the entry of judgment by default is a drastic remedy and should be resorted to only in extreme situations. *E.F. Hutton & Co. v. Moffatt,* 460 F.2d 284 (5th Cir. 1972). Whenever possible, cases should be decided on their merits for default judgments are not favored in law. *United States v. Skalsky,* 71 F.R.D. 564 (E.D. Pa. 1976), *aff'd,* 556 F.2d 570 (3rd Cir. 1977). It has also been noted that courts look upon default with disfavor, since the interests of justice are best served by a trial on the merits of a case. *Hamilton v. Edell,* 67 F.R.D. 18 (E.D. Pa. 1975); *Wilson v. Winstead,* 84 F.R.D. 218 (E.D. Tenn. 1979). Default judgments are not favored in law, since courts exist to do justice and are reluctant to enforce an unjust judgment. *Trueblood v. Grayson Shops of Tennessee, Inc.,* 32 F.R.D. 190 (E.D. Va. 1963).

Pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, the Court, on motion and upon such terms as are just, may relieve a party from a final judgment. Moreover, a motion submitted under this Rule should be construed liberally to do substantial justice. *Blanchard v. St. Paul Fire and Marine Ins. Company,* 341 F.2d 351 (5th Cir. 1965), *cert. denied,* 382 U.S. 829, 86 S. Ct. 66, 15 L. Ed. 2d 73 (1965). This Rule gives the district court a grand reservoir of equitable power to do justice in any

particular case and the Rule providing relief hereunder should be liberally construed when substantial justice will thus be served. *Radack v. Norwegian-America Line Agency, Inc.*, 318 F.2d 538 (2nd Cir. 1963). Subsection b(1) of Rule 60 is remedial in character and should be so applied as to dispose of cases upon their substantial merits and to give a party claiming in good faith to have a substantial defense to the action an opportunity to present it. *United States v. Berger*, 86 F.R.D. 713 (W.D. Pa. 1980).

In the case of *AFSCME Council 25 v. Maintenance Central for Seniors*, 856 F.2d 192 (6th Cir. 1988), the court in considering Rule 55 and Rule 60 motions, restated the well-settled rule that three factors should be considered in determining the outcome of a motion to vacate a default judgment:

1. The prejudice to the plaintiff;

2. The merits of the defense; and

3. The culpability of the conduct of the defendant leading to the default.

See also, Buck v. U.S. Dept. of Agriculture, Farmer's Home Administration, et al., 960 F.2d 603 (6th Cir. 1992). In the instant case, setting aside the default would not prejudice the Respondent.

However, the compelling reason to set aside this default judgment is because of the merits of the defense. Specifically, the Petitioner was never served with process. Perhaps even more important, the Respondent is not a real party in interest and does not have standing to bring this action. Finally, the complaint fails in its attempt to allege a RICO violation based on one transaction with no allegation of enterprise or articulable RICO damages.

Apparently, RICO was alleged so the Respondent could seek a large award of treble damages even though no proof of damages existed. Accordingly, under Federal Rules of Civil Procedure, Rule 60(b)(3), the default judgment should be set aside for fraud.

It is respectfully urged that this Petitioner has a meritorious defense to this claim, and the claim for damages under RICO is wholly inappropriate and not supported by law, or even the factual allegations set forth in the complaint.

CONCLUSION

Equity abhors a default. The Petitioner, a foreign national, was not properly served. The district court entered a default judgment against the Petitioner, then prior to the entry of a final judgment, the Petitioner made a good faith attempt to have the litigation heard on its merits by entering an appearance to set aside the default. However, the Petitioner's motion was denied. The default judgment should have been set aside to allow the Petitioner his day in court and the opportunity to defend himself.

Respectfully submitted,

HELEN S. ROGERS
Counsel of Record
DOUGLAS E. JONES
JONES & ROGERS
Attorneys for Petitioner
Suite 1500
Third National Bank Building
201 Fourth Avenue, North
Nashville, Tennessee 37219
(615) 256-3774

APPENDIX A — ORDER OF THE SIXTH CIRCUIT COURT OF APPEALS DENYING REHEARING EN BANC FILED AUGUST 19, 1993

No. 92-5494

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EMPIRE SERVICES, INC.,

Plaintiff-Appellee,

v.

THOMAS NSENGA KANZA,

Defendant-Appellant.

ORDER

BEFORE: MARTIN and SILER, Circuit Judges; and COFFIN,* Senior U.S. Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

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* Hon. Frank M. Coffin sitting by designation for the United States Court of Appeals for the First Circuit

Appendix A

ENTERED BY ORDER OF THE COURT

s/ Leonard Green,
Leonard Green, Clerk

APPENDIX B — SIXTH CIRCUIT COURT OF APPEALS OPINION FILED JULY 1, 1993

No. 92-5494

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EMPIRE SERVICES, INC.,

Plaintiff-Appellee,

v.

THOMAS N. KANZA,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

BEFORE: MARTIN and SILER, Circuit Judges; and COFFIN, Senior Circuit Judge.*

PER CURIAM. Thomas N. Kanza appeals the district court's final default judgment against him in this diversity action regarding fraudulent conduct. Upon motion of Empire Services, the district court entered a default when Kanza failed to plead within the time required. A judgment for $187,500 and $10,157 in attorney fees was entered after holding a hearing on the entry of default. We affirm the district court.

Empire Services, Inc., a Tennessee corporation with its principal place of business in Nashville, Tennessee, is the successor in interest to James L. Winfree in certain contract rights

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* The Honorable Frank M. Coffin, Senior Circuit Judge for the United States Court of Appeals for the First Circuit, sitting by designation.

against Thomas Kanza, a citizen of Zaire, Africa and a resident of Oxford, England. Winfree was to receive fees from Kanza for locating individuals to provide export financing for coffee shipments, and the lenders would receive their principal and a thirty percent return on their loans after the coffee was exported.

Shortly after January 15, 1989, Kanza persuaded Winfree to become involved in the export financing scheme. The alleged export contracts provided for purchase of coffee from growers in Zaire and Congo and shipment of the coffee to European buyers pursuant to other contracts that had been executed earlier. Kanza represented that the contracts with the European buyers had been negotiated by him on behalf of certain corporations in which he had invested. These companies included S.N.E.C., a corporation in Congo, FATIM (U.K.), a British corporation, and FATIM (Zaire), a Zairian corporation.

Winfree convinced two unidentified lenders to provide $25,000 each for Kanza's financing scheme. According to Empire Services, the agreement with Kanza provided that Winfree would obtain a $5,000 finder's fee for each shipment, and each lender would receive $2,500 per shipment. Kanza told Winfree that the coffee contracts dictated that there would be approximately one shipment per month for nine months, starting March 30, 1989. Neither Winfree nor the lenders ever received payment from Kanza. On May 15, 1989, Kanza sent a copy of a proposed coffee contract by telefax from London to Nashville to forestal action by Winfree and the two lenders to collect their investment principal and profits.

Winfree later purchased the entire claim of one of the lenders and acquired the rights to receive some of the second lender's profits. However, the second lender did not transfer the right to

return of principal. Winfree continued to request repayment of principal, but Kanza did not pay the profits that he promised or return the principal. Winfree subsequently assigned all of his rights against Kanza to Empire Services.

On April 27, 1990, Empire Services filed a complaint against Kanza alleging a violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961, *et seq.* The complaint also listed state causes of action for breach of fiduciary duty, conversion, and fraudulent breach of trust. Empire Services alleges that Kanza knowingly made false and fraudulent statements by telephone and in person to induce lenders to enter the financing contracts and to assure them that the coffee contracts remained in effect.

On May 3, the Tennessee Secretary of State mailed a copy of the complaint and summons to Kanza in England by certified mail with a return receipt requested, in accordance with state law, but a return receipt was not received. Empire Services filed a motion to declare service effective and for entry of a default judgment pursuant to FED. R. CIV. P. 55(a) for failure to answer. The district court ruled that service had been perfected and entered default against Kanza on April 29, 1991.

Kanza moved to set aside the default on the grounds that service was ineffective, that Empire Services lacked standing, and that the pleadings were insufficient to state a RICO claim. On March 6, 1992, the district court denied Kanza's motion and granted Empire Services a judgment of $187,500 plus $10,157 in attorney's fees. The amount of the judgment was based on total damages of $62,500, trebled pursuant to 18 U.S.C. § 1964(c) (RICO). The $62,500 figure represents $50,000 in principal plus $12,500 in prejudgment interest on the investments computed at an

annual rate of ten percent between February 8, 1989 and August 8, 1991. On April 3, 1992, Kanza filed a notice of appeal.

Before addressing Kanza's arguments, we confirm that the district court had jurisdiction to decide this dispute. The district court has subject matter jurisdiction based on diversity of citizenship because Empire Services is a Tennessee corporation and Kanza is a citizen of Zaire. Additionally, the RICO claim is a federal question which confers subject matter jurisdiction to the district court. Personal jurisdiction is based on Tenn. Code Ann. § 20-2-214, the Tennessee Long-Arm Statute. Kanza traveled to the forum state to solicit business from James Winfree and his associates, the predecessors in interest to the claims of Empire Services. While Kanza was in Tennessee, he allegedly made fraudulent representations. Moreover, on May 15, 1989, Kanza sent a copy of a proposed export contract by telefax from London to Nashville to convince Winfree and the investors that the financing scheme was legitimate. These actions are sufficient to establish personal jurisdiction.

Kanza faces a substantial hurdle in seeking to have us overturn the final default judgment against him. Once the district court has entered a default judgment, setting aside an entry of default becomes very difficult. *See* FED. R. CIV. P. 55(c) (indicating that a defendant may move for relief from a judgment pursuant to FED. R. CIV. P. 60(b) after a judgment by default has been entered). The district court could have set aside the entry of default against Kanza pursuant to FED. R. CIV. P. 55(c) for "good cause shown." The district court determined that Kanza presented no good cause for setting aside the entry of default, and the court entered a final default judgment pursuant to FED. R. CIV. P. 55(b)(2).

Appendix B

Upon review, a default that has become final as a judgment can be set aside only under strict standards for setting aside final and appealable orders. *Berthelsen v. Kane,* 907 F.2d 617, 620-21 (6th Cir. 1990). In *United Coin Meter v. Seaboard Coastline Railroad,* 705 F.2d 839, 845 (6th Cir. 1983), we outlined three important considerations, which, as applied in this case, are: (1) whether Empire Services will be prejudiced by reopening the case, (2) whether Kanza has a meritorious defense, and (3) whether Kanza's culpable conduct led to the default.

In regard to the possibility of prejudice against Kanza, Empire Services contends that Kanza has moved to Zaire, thereby increasing the difficulty of discovery. However, we find no evidence in the record to support the allegation that Kanza has relocated. Consequently, we do not find that there is a sufficient likelihood of prejudice to require us to affirm the default judgment on this basis.

Another factor to be considered on review of the default judgment is Kanza's defenses. The district court held that all three of Kanza's defenses are without merit. We agree. Kanza first raises the defense that he was improperly served with notice of Empire Service's claim. Due process requires proper service of process for the court to have jurisdiction to adjudicate the rights of the parties. *Amen v. Dearborn,* 532 F.2d 554, 557 (6th Cir. 1976). Therefore, if service of process was not proper, the court must set aside the default judgment. FED. R. CIV. P. 4(c)(2)(C)(i) provides that service shall be made in accordance with state law. Empire Services attempted to effect service by employing the procedures set out in Tenn. Code Ann § 20-2-215. That statute states, in pertinent part:

(a) Service of such process shall be made by

> lodging . . . with the secretary of state, who shall promptly send, postage prepaid, the certified copy by a registered or certified return receipt mail to the defendant, along with written notice that service was so made.

In accordance with the statute, Empire Services delivered the original summons and a certified copy of the complaint to the Office of the Secretary of the State of Tennessee, and the Secretary of State mailed those documents by certified return-receipt mail to Kanza at his England address. Once the Secretary of State receives the return receipt, the statute directs him to notify the district court clerk of the receipt. For unknown reasons, however, the postal authorities never returned the certified mail receipt to the Secretary of State. Although the return receipt was never returned, the district court exercised its authority to declare service effective. FED. R. CIV. P. 4(i)(1)(D).

Kanza argues that there is insufficient evidence to indicate that Kanza had received or had knowledge of the complaint and summons. Kanza contends that the absence of a signed return-receipt establishes that Kanza was not properly served. However, Empire Services made proof of service on Kanza as permitted by FED. R. CIV. P. 4(i)(2) by presentation of evidence of delivery in the form of an affidavit of Empire Services' attorney. Therefore, Empire Services established that service of process was sufficient and proper.

Kanza's second defense is that Empire Services was not the real party in interest in this matter, and therefore, that Empire Services lacked standing in this action. However, Empire Services was a valid assignee of Winfree, and therefore, had standing. Winfree was entitled to payment from Kanza for locating lenders.

Winfree also bought the entire claim of one of the original lenders and acquired the rights to receive a portion of the second lender's promised profits. Winfree later assigned all of his rights against Kanza to Empire Services as permitted under Tennessee law. *See Ford v. Robertson*, 739 S.W.2d 3 (Tenn. Ct. App. 1987). Thus, this defense is without merit.

Kanza's final defense is that Empire Services failed to allege a RICO cause of action because there was only one alleged fraudulent action with no specific allegations that a racketeering enterprise existed. Kanza contends that Empire Services failed to allege at least two illegal acts as required to establish a "pattern of racketeering activity." 18 U.S.C. § 1961(5). Kanza argues that Empire Services could not show a pattern of illegal activity because there was only one meeting between the lenders and Kanza. The district court accepted the magistrate judge's determination that Kanza's numerous false statements to potential and actual investors presented a threat of continuing illegal conduct and constituted a pattern of criminal activity within the meaning of the statute. We agree with this evaluation. *See H. J. Inc. v. Northwestern Bell Telephone, Inc.*, 492 U.S. 229, 239 (1989) (holding that a pattern of racketeering may be established by showing "that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity.") Therefore, all of Kanza's defenses are without merit and cannot provide a basis for reversing the default judgment.

The third factor in reviewing a default judgment is to determine whether Kanza's willful conduct led to the default. Kanza disregarded the complaint even though it was properly served and he was at least constructively aware of it. The default judgment resulted from Kanza's conscious decision not to respond to the district court's service of process. Consequently, Kanza is

not entitled to a reversal of the default judgment because of his own culpable conduct.

Accordingly, the judgment of the district court is affirmed.

APPENDIX C — ORDER DENYING MOTION TO VACATE DEFAULT JUDGMENT AND TO AWARD JUDGMENT FILED MARCH 6, 1992

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DOCKET NO. 3:90-0358

EMPIRE SERVICES, INC.

vs.

THOMAS NSENGA KANZA

ORDER

Pending before the Court in the above styled action is defendant's motion to set aside the default entered against him pursuant to Fed. R. Civ. P. 55(a). A hearing was held in this matter and the Court finds that the defendant has failed to show due diligence in this case and has presented the Court with no good cause for setting aside the default.

The Court has previously found that the defendant received proper notice of this suit but nevertheless failed to make any response. This action was commenced in April, 1990 and default entered in April, 1991. Service was made upon the defendant and defendant's attorney in New York, but it was not until October, 1991, that defendant's counsel filed papers wlth this Court, seeking to set aside the default. The basis provided for setting aside the default consisted of conclusory claimis attacking the effectiveness of service, the plaintiff's standing, and the specificity of plaintiff's pleadings. At the hearing, defense counsel merely repeated these bare claims and the Court was presented no factual basis for setting aside the default.

Appendix C

In a well reasoned and thorough Report and Recommendation, the Magistrate has found that plaintiff is the proper party in this actlon and that a RICO clalm has been sufficiently pleaded. Accordingly, the Court ADOPTS the Magistrate's Report and Recommendation and ENTERS a final default judgment against the defendant pursuant to Fed. R. Civ. P. 55(b)(2). Plaintiff is awarded damages in the amount of $187,500, and attorney fees and costs in the amount of $10,157.12.

Entered this the 6th day of March, 1992.

s/ John T. Nixon
JOHN T. NIXON, CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX D — REPORT AND RECOMMENDATION FILED OCTOBER 3, 1991

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

NO. 3 :90-0358

EMPIRE SERVICES, INC.

v.

THOMAS NSENGA KANZA

TO: Honorable John T. Nixon, Chief Judge

REPORT AND RECOMMENDATION

This suit was filed pursuant to the Court's diversity jurisdiction, 28 U S C. § 1332, inasmuch as the plaintiff is a Tennessee corporation with its principal place of business in Nashville, and the defendant is a citizen of Zaire, and the amount in controversy exceeds $50,000 exclusive of interest and costs. The Court also has jurisdiction of a cause of action under the Racketeer Influence and Corruption Organizations Act {RICO], 18 U.S.C. §§ 1964(c) and 1965(a). The Court previously found that defendant had been properly served with process in this cause. *See* Docket Entry No. 9. On April 29, 1991, the Clerk, upon motion of the plaintiff, entered default, the defendant having failed to plead within the time allowed.

On May 30, 1 991, the Court referred the issue of damages to the undersigned pursuant to 28 U.S.C. § 636(b)(3), to hold a hearing and receive the plaintiff's proofs on such issues and report

Appendix D

to the Court findings, conclusions and recommendation.

On July 19, 1991, the undersigned held a hearing, the plaintiff appeared with counsel and presented its proofs, and the following are my findings of fact, conclusions and recommendation

FINDINGS OF FACT

The plaintiff is the lawful successor to the interest and liabilities of James L. Winfree in certain contract rights against this defendant arising out of the defendant's agreement to divide the profits of contracts for the sale of coffee with Winfree and with investors obtained by Winfree.

During the period between January 15, 1989, and February 6, 1989, the defendant induced Winfree to obtain investors to finance alleged contracts to purchase coffee from growers in Zaire and in the Congo (Brazzaville) to arrange for the shipment of that coffee to Europe and there to fulfill contracts allegedly executed prior to this time for the sale of the coffee to European customers. These negotiations were conducted in numerous telephone conversation and telefax transmissions between the defendant in London and the Nation of Congo. The defendant represented that these contracts had been negotiated by him on behalf of certain corporations in which he had a substantial financial interest, and which were controlled by him, and he identified one as S.N.E.C., a Congoleze corporation, FATIM (U.K.), a British corporation, and FATIM (Zaire), a Zairian corporation.

Mr. Winfree succeeded in obtaining two investors to invest $25,000 each in the alleged contracts. Defendant promised Winfree that his (Winfree's) fee for the obtaining of the investors would be $5,000 for each shipment of coffee under the contract. The investors were to receive $2,500 per investment per shipment.

Appendix D

Defendant stated to Winfree that the contracts referred to provided for approximately one shipment of coffee each month for nine months, beginning no later than March 30, 1989.

Each and every shipment made by the defendant to induce Winfree to obtain investors, and to induce the investors to make the investments were false, in that no such contracts for the sale of coffee ever existed, and no sales were ever made. Further, the defendant well knew that each and every statement that he had made for the purpose of inducing investment in the alleged contracts was false at the time each such statement was made.

After defendant failed to remit profits by April 1 , 1989, Mr. Winfree began to make persistent inquiries of defendant as to the status of the contracts, and defendant, in numerous telephone conversations between defendant in London and Mr. Winfree in the United States continued to insist that the contracts were in effect, and that payments would be forthcoming shortly.

On May 15, 1989, defendant sent a copy of a proposed contract by telefax from London to Nashville, for the purpose of convincing Winfree and the investors of the bonafides of the transaction.

The conversations and telefax described above were conducted and sent by defendant to forestall action by Mr. Winfree and the investors to pursue collection of the contract profits which they had been promised.

Many of the statements made to the investors and to Winfree, whereby the investors were induced to enter into the contracts, were made by telephone and wire transmissions, while other statements were made by the defendant in person, in Nashville,

Tennessee, to several people, including Mr. Winfree and at least one of the investors at a meeting held in Nashville in February of 1989. As a result of the defendant's false and fraudulent statements by telephone and by wire transmission, the investor's money was transferred to the defendant by Mr. Winfree on or about February 6, 1989, with esch investor entrusting $25,000 to the defendant.

Prior to the trsnsactions here described, the defendant was engaged in the general conduct of an export/import business between African nations and Europe, involving defendant individually as well as the corporations named herein above.

Defendant has to date failed to account for the funds entrusted to him, failed to pay the alleged profits which he promised would be paid, and, desplte numerous demands, has not repaid the principle entrusted to him by the investors.

CONCLUSIONS OF LAW

The plaintiff, as the legal successor in interest to James L. Winfree, is entitled to damages from the defendant in the following amounts, and on the following grounds.

In the amount invested, namely $50,000, *Fleischhauer v. Feltner,* 879 F.2d 1290 (6th Cir. 1989). The defendant's actions described above constituted racketeering activity within the definitions set out in 18 U.S.C. § 1961(1), the same being based upon violations of 18 U.S.C. § 1343 (wire fraud). Defendant's actions, together with those of S.N.E.C., FATIM U.K. and FATIM Zaire, with respect to the specific activities here described constitute an enterprise within the definition set forth in 18 U.S.C. § 1961.

Appendix D

Defendant's actions in making numerous false statements to induce investments in non-existent contracts and the stall in investors collection efforts, constituted a pattern of racketeering activity within the definition set forth in 18 U.S.C. § 1961(5) and such pattern of racketeering activity was one affecting foreign commerce.

The activities of the defendant and of FATIM U.K., FATIM Zaire and S.N.E.C. constituted an enterprise within the definition of Section 1961(4) apart from the enterprise in which the plaintiff complains.

However, the profits promised to Winfree and to the respective investors in the amount of $45,000 for Mr. Winfree and $22,500 for each of the investors, or a total of $90,000, is too speculative to be allowed as damages under RICO. *Fleischhauer,* 879 F.2d at 1299, 1300. The sole basis plaintiff asserts for the amount of the expected profits from the venture is what the defendant told them. This is not "a reasonable and principled basis of recovery." *Id.*, at 1299.

Prejudgment interest on the investments from the date the funds were delivered to defendant, February 8, 1989, at the rate of 10 percent per annum, which to August 8, 1991, amounts to $12,500 on the principal of the unreturned investments.

The total damages outlined above, $62,500, must be multiplied by three. 18 U.S.C. § 1964(c).

The plaintiff is also entitled to recover a reasonable attorneys fee and costs. 18 U.S.C. § 1964(c). A reasonable fee is calculated by multiplying a reasonable rate by the number of hours reasonably required to prosecute the case by counsel. *Hensley v. Eckerhart,* 461 U.S. 424 (1983); *Blum v. Stenson,* 465 U.S. 886

(1984); *Northcross v. Board of Education,* 611 F.2d 624 (6th Cir. 1979).

I have reviewed Mr. Watts' affidavit and statement of services and conclude that the hours devoted to the litigation appear to be only those hours reasonably expended on the litigation. *See* Watts Affidavit of July 30 1991, and Attachment. Mr. Watts also claims that $150 is the usual hourly rate in this community for attorneys of his experience and skill. *Id.* I conclude that an hourly rate of $125 is a reasonable rate. I therefore find that a reasonable fee in this case is $10,125. The attorney's costs are $32.12.

RECOMMENDATION

I recommend that the Court enter judgment on the default in favor of plaintiff and against this defendant for one hundred eighty-seven thousand five hundred dollars ($187,500), and attorney fees and costs in the amount of ten thousand one hundred fifty-seven dollars and twelve cents ($10,157,12).

ANY OBJECTIONS to this Report and Recommendation must be filed with the Clerk of Court within ten (10) days of receipt of this notice, and must state with particularity the specific portions of this Report, or the proposed findings or recommendation to which objection is made. Failure to file objections within the specified time waives the right to appeal the District Court's Order. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters,* 638 F.2d 947 (6th Cir. 1981).

Respectfully submitted,

s/ [illegible]
UNITED STATES MAGISTRATE
JUDGE

APPENDIX E — ENTRY OF DEFAULT FILED APRIL 29, 1991

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

CIVIL ACTION NO. 3:90-0358
JUDGE NIXON

EMPIRE SERVICES, INC.

Plaintiff

vs.

THOMAS NSENGA KANZA

Defendant

ENTRY OF DEFAULT

Pursuant to the Magistrate's Order entered on the docket on December 4, 1990, service on the defendant was declared effective as of May 5, 1990. Since there has been no responsive pleading from the defendant, DEFAULT is hereby entered against the defendant, Thomas Nsenga Kanza, pursuant to Rule 55(a) of the Federal Rules of Civil Procedure.

ENTERED THIS 29th DAY OF April, 1991.

Juliet Griffin, Clerk
s/ Doris Bush,
BY: Doris Bush, Deputy Clerk

APPENDIX F — ORDER DECLARING SERVICE TO BE EFFECTIVE FILED DECEMBER 4, 1990

IN THE UNITED STATES DISTRICT COURT
FOR MIDDLE DISTRICT OF TENNESSEE

No. 3-90-0358
Judge Nixon/Magistrate Sandidge

EMPIRE SERVICES, INC.,

Plaintiff,

v.

THOMAS NSENGA KANZA,

Defendant.

ORDER

The Court has considered Plaintiff's Motions, previously submitted, to Declare Service Effective and For a Default and For Leave to Take a Deposition, and has also considered the Affidavits and Memoranda submitted by Plaintiff in support of said Motions. On the basis of these documents, and the entire record, the Court concludes that the Motion to Declare Service Effective is well taken, and ought to be granted, that the Motion For a Default ought to be, for the time being, overruled without prejudice, and that the Motion for Leave to Take a Deposition is moot. Accordingly the Court finds and holds as follows:

1. The Plaintiff attempted to effect service on the Defendant by employing the procedures set forth in Tennessee Code Annotated Sections 20-2-214 et seq., which sections provide for service on a Defendant by delivering the original summons and a certified copy of the Complaint to the Office of the Secretary of the State of Tennessee, that that Office thereafter mail those

documents certified return receipt mail to the Defendant, and that, upon receipt by that Office of the postal form reflecting such receipt, the Secretary of State in turn notify the Clerk of this Court of such receipt.

2. The Secretary of State of the State of Tennessee made the required mailing on May 3, 1990 (Exhibit A to Plaintiff's Motion)

3. The Defendant apparently received the Summons and Complaint at his residence in England on or about May 9, 1990. (Affidavit of Plaintiff's attorney Paragraph 3)

4. For reasons which are unknown, the certified mail receipt on which Defendant acknowledged receipt of the Summons and Complaint were never returned to the Secretary of State of the State of Tennessee by the postal authorities. (Exhibit A to Plaintiff's Motion)

5. The Defendant has had ample time and opportunity to appear and answer or otherwise plead to the Complaint filed in this cause, and which the Court finds Defendant has received, but Defendant has failed to do so.

6. The Court has the authority to declare service effective. Federal Rules of Civil Procedure ("FRCP") Rule 4(i)(1)(D) and 4(i)(2); *Puerto Rico Maritime Shipping Authority v. Almogy,* 510 F. Supp. 873 (S.D.N.Y. 1981).

7. The Plaintiff has made proof of service on the Defendant as permitted by FRCP Rule 4(i)(2) by the presentation of evidence of delivery to the addressee satisfactory to the Court, such evidence being in the form of the Affidavit of Plaintiff's attorney.

Appendix F

8. Accordingly, the Court ORDERS that service on the Defendant be, and the same is hereby, declared to have been effective no later that May 15, 1990.

9. The Court will require that, unless the Defendant appears and answers or otherwise pleads prior to the filing of a Motion for Default by the Plaintiff, the Plaintiff will be required to make such a Motion and to give Defendant adequate Notice of the filing of such Motion prior to the entry of a default.

10. The ruling of the Court on Plaintiff's Motion to Declare Service Effective having made Plaintiff's Motion for Leave to Take a Deposition moot, said Motion is accordingly overruled.

s/ Kent Sandidge, III
Kent Sandidge, III
United States Magistrate

This Order prepared by:

s/ Thomas E. Watts, Jr.
Thomas E. Watts, Jr.
Attorney for Plaintiff
Supreme Court Reg. #3500
222 Fourth Avenue, North
Post Office Box 3050
Nashville, TN 37219

APPENDIX G — RELEVANT STATUTES, RULES AND CONSTITUTIONAL PROVISION

Federal Statutes

18 U.S.C. § 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1961. Definitions.

(3) "person" includes any individual or entity capable or holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity

18 U.S.C. § 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. § 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both, and shall forfeit to the United States, irrespective of any provision of State law. . . .

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any—

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over;

any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds. . . .

18 U.S.C. § 1964. Civil remedies

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

Appendix G

18 U.S.C. § 1965. Venue and process

(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

Federal Rules of Civil Procedure

Rule 4(g) Return. The person serving the process shall make proof of service thereof to the court promptly and in any event within the time during which the person served must respond to the process. . . . If service is made under subdivision (c)(2)(C)(ii) of this rule, return shall be made by the sender's filing with the court the acknowledgment received pursuant to such subdivision. Failure to make proof of service does not affect the validity of the service.

Rule 4(i) Alternate Provisions for Service in a Foreign Country.

(1) Manner. When the federal or state law referred to in subdivision (e) of this rule authorizes service upon a party not an inhabitant of or found within the state in which the district court is held, and service is to be effected upon the party in a foreign country, it is also sufficient if service of the summons and complaint is made: . . . (D) by any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served.

(2) Return. . . . When service is made pursuant to subparagraph (1)(D) of this subdivision, proof of service shall include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court.

Rule 17. Parties Plaintiff and Defendant; Capacity

(a) Real Party In Interest. Every action shall be prosecuted in the name of the real party in interest. . . .

Rule 55(c) Setting Aside Default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

Rule 60 (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . or (6) any other reason justifying relief from the operation of the judgment. . . .

Tennessee Code Annotated:

Tenn. Code Ann. § 20-2-206. Evidence of service through secretary of state.

The original process, endorsed as below, an affidavit of the secretary of state setting forth his compliance with the requirements of s 20-2-205, and the return-receipt signed by, or duly in behalf of, the defendant, shall be attached together and sent to and filed by the clerk. There shall be endorsed on the original

process by the secretary of state over his signature the date of his mailing the certified copy to the defendant and the date on which he received the return-receipt of the defendant; thereupon service on the defendant shall be consummate. An act of a deputy or regular assistant of the secretary of state in his behalf, hereunder, shall be deemed the equivalent of the act of the latter.

Tenn. Code Ann. § 20-2-216. Proof of mailing by secretary of state and receipt by defendant.

The original process, endorsed as below, an affidavit of the secretary of state setting forth his compliance with the requirements of the preceding section, and the return-receipt signed by, or duly in behalf of, the defendant, shall be attached together and sent to and filed by the clerk. There shall be endorsed on the original process by the secretary of state over his signature the date of his mailing the certified copy to the defendant and the date on which he received the return-receipt of the defendant; thereupon service on the defendant shall be consummate. An act of a deputy or regular assistant of the secretary of state in his behalf, hereunder, shall be deemed the equivalent of the act of the latter.

Other

1963 Advisory Committee Notes to Rule 4(E)(i)(2)

Subdivision (i)(2). When service is made in a foreign country, paragraph (2) permits methods for proof of service in addition to those prescribed by subdivision (g). Proof of service in accordance with the law of the foreign country is permitted because foreign process servers, unaccustomed to the form or the requirement of return of service in the United States, have on occasion been unwilling to execute the affidavit required by Rule

Appendix G

4(g). . . . As a corollary of the alternative method of service in subdivision (i)(1)(E), proof of service as directed by order of the court is permitted. The special provision for proof of service by mail is intended as an additional safeguard when that method is used. . . .

United States Constitution, Amendment Five

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.